

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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JAMES FARR,

01 CR 6921 (NG) (MDG)

Petitioner,

-against-

ORDER

**CHARLES GREINER, Superintendent of Green
Haven Correctional Facility,**

Respondent.

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GERSHON, United States District Judge:

On February 23, 2007, Magistrate Judge Marilyn D. Go issued a thorough and comprehensive Report and Recommendation in which she recommends the denial of the petition for a writ of habeas corpus. The petitioner has filed objections to various aspects of the Report, and his counsel has filed objections limited to the depraved indifference murder issue. I have carefully reviewed all of the objections and conclude that none is meritorious. With respect to petitioner's argument that Judge Go failed to apply *Massaro v. United States*, 538 U.S. 500 (2003), in holding that certain ineffectiveness of trial counsel claims were procedurally barred, I note that "Massaro is not a constitutional decision, and by its own language it did not extend its rule beyond § 2255." *Sweet v. Bennett*, 353 F.3rd 135, 140 (2d Cir. 2003). It affords no relief from procedural bar in this case, which challenges a state, not federal, conviction. With respect to petitioner's other objections, I rely on the analysis set forth by Judge Go.

Counsel's objections relate to the sufficiency of the evidence for the depraved indifference murder conviction. Judge Go's analysis, based upon *Herbert v. Policano*, 7 N.Y.3d 588 (2006), properly rejects the claim that the evidence was insufficient to support depraved indifference murder and that counsel therefore should have raised the issue. Judge Go accurately describes the New

York state law applicable at the time of petitioner's conviction and expressly identifies the facts and circumstances from which the jury reasonably could have concluded that petitioner acted with recklessness and not with the intent to murder. For the reasons stated by Judge Go, there is no basis for habeas corpus relief with respect to the depraved indifference claim.

In sum, the petition for a writ of habeas corpus is denied. Since petitioner has failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability is denied pursuant to 28 U.S.C. § 2253(c). The Clerk of Court is directed to enter judgment for respondent and close this case.

SO ORDERED.

/s/

NINA GERSHON
United States District Judge

Dated: Brooklyn, New York
April 10, 2007